

ADMINISTRATIVE APPEAL DECISION

GARY GAMBEL, FILE NO. EE-19-970-3239

NEW ORLEANS DISTRICT

JUNE 30, 2000

Review Officer: Ms. Martha S. Chieply, U.S. Army Corps of Engineers (USACE),
Mississippi Valley Division

Appellant/Applicant: Mr. Gary Gambel

Applicant Representative: Mr. Chris M. Trepagnier, Oats & Hudson

Receipt of Request For Appeal (RFA): April 7, 2000

Appeal Conference Date: June 2, 2000 Site Visit Date: June 1, 2000

Background Information: Mr. Gambel submitted a Department of the Army Permit Application on December 24, 1996. The original project described in the Public Notice dated June 9, 1998, proposed to fill 1.5 acres of wetlands, consisting of one acre of tidally influenced marsh and 0.5 of an acre of hardwood scrub/shrub wetlands for the construction of a house and associated structures and features.

The project site is located within the New Orleans District (MVN) on U.S. Highway 90 (highway), on Weems Island, in St. Tammany Parish, Louisiana, about two miles northeast of the Rigolets and Fort Pike. The back of the property fronts Geoghegan Canal, a borrow area created by the construction of the highway in the early 1930's. The canal is connected to the navigable waters of the Rigolets. The property between the highway and the canal was subdivided into lots after the highway was constructed.

Based on preliminary evaluation of the original proposal and agency comments, the MVN's Decision Document (MVN DD), dated October 21, 1999, determined that the proposed project would not meet 40 CFR Part 230 Section 404(b)(1) Guidelines (404(b)(1) Guidelines) because alternative practicable measures to minimize wetland impacts existed. The MVN revised the project purpose limiting impacts to 0.5 acre of hardwood scrub/shrub wetlands. A draft permit was offered to Mr. Gambel on October 21, 1999. Mr. Gambel declined the draft permit and provided two response letters dated March 6, 1999, and December 22, 1999. In the MVN's letter, dated January 31, 2000, the MVN stated there was no reason to reverse the Corps' initial evaluation of Mr. Gambel's project, and advised him of the Corps of Engineers Administrative Appeal Process.

Mr. Chris M. Tregpagnier, Oats & Hudson, was Mr. Gambel's authorized agent during the permit evaluation.

An affecting party appealing an approved jurisdictional determination, permit denial or declined permit must submit an RFA that is received by the Division Engineer within 60 days of the date of the Notification of Appeal Process (NAP). The NAP for Mr. Gambel was dated February 9, 2000. In a letter dated April 4, 2000, Mr. Tregpagnier provided the requisite Request for Appeal Form. The RFA was received within the requisite 60 days of the date of the NAP. In our letter dated May 5, 2000, the Mississippi Valley Division stated that the RFA had been reviewed and determined to meet the criteria for appeal. Mr. Tregpagnier is Mr. Gambel's representative for this Administrative Appeal. Throughout this document Mr. Gambel is referred to as the Appellant, and Mr. Tregpagnier is the Appellant's Representative.

Information Received and its Disposition during the Appeal Review:

1. Email message dated June 23, 1999, from Ms. Ivy Twyman of the Louisiana Department of Natural Resources. The email detailed the calculations used in the Wetland Valuation Assessment (WVA) for Mr. Gambel's project. A handwritten note on the email documents a conversation with Mr. John Reddock, an MVN project manager, concerning the application of the WVA. Disposition: Considered as clarifying information.
2. Administrative record from permit authorization for Mr. Weston Harley Yates, Jr. [number 20-000-1483 (St. Tammany Parish Wetlands) 268]. Disposition: Considered as clarifying information.
3. Administrative record from permit authorization for Mr. August J. Maurer [SE (St. Tammany Parish Wetlands) 268]. Disposition: Considered as clarifying information.
4. New Orleans District Programmatic General Permit (NOD-PGP) and PGP Special Conditions. Disposition: Considered as clarifying information.

Of the supplemental information received, all items were provided to the Appellant at the appeals conference.

Basis for Appeal as Presented by Appellant (Quoted from the Appellant's RFA):

Appellant's Reason 1: The NOD (New Orleans District) completely ignored the portion of 40 CFR 230.10(a)(3) which states, "unless clearly demonstrated otherwise: therefore, the NOD has denied Mr. Gambel the opportunity to clearly demonstrate that there are no practicable alternatives to his proposed project. The failure by the NOD to allow Mr. Gambel to show that there are no practicable alternatives to his proposed project is in direct contradiction to the 404(b)(1) guidelines. Therefore, the Corps has incorrectly applied its own regulations and the proffered permit should be appealed.

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: The MVN provided the Appellant sufficient opportunity to demonstrate that there were no practicable alternatives to his proposed project. Review of the administrative record shows that the MVN correctly followed the 404(b)(1) Guidelines. MVN determined that the appellant's project purpose was not water dependent. The 404(b)(1) Guidelines state that water dependency is a rebuttable presumption. The MVN's DD properly determined that the Appellant did not sufficiently rebut the presumption of water dependency.

The Appellant's RFA referenced 404(b)(1) Guidelines 40 CFR Sec. 230.10(a)(3) which state:

"Where the activity associated with a discharge which proposed for a special aquatic site (as defined in Subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated other wise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise."
[40 CFR 230.10(a)(3)].

The preamble to the 404(b)(1) Guidelines [40 CFR 230.10(a)(3)] indicate that it is the applicant's responsibility to rebut the presumption that here is a less damaging non-wetland alternative. Review of the administrative record shows the MVN did provide Mr. Gambel the opportunity to demonstrate that there are no practicable alternatives to his proposed project. In letters dated June 19 and 26, 1998, and July 2, 1998, the MVN provided comment letters to the applicant through the authorized agent. These comment letters specifically requested that the applicant address avoidance and minimization of impacts on-site. In another letter dated July 13, 1998, the MVN concurred with the assessment of the Environmental Protection Agency and the National Marine Fisheries Service that the area subject to the permit application is a high quality, tidally-connected marsh and an aquatic resource of national importance; the adverse impact of which may be contrary to the overall public interest. The MVN questioned the need for the scope of work associated with this particular project, and suggested that the appellant consider alternative designs and/or locations that would not impact wetlands or would minimize wetland impacts. The Appellant's Representative, responded to the MVN's request for alternative sites/configuration. Mr. Tregpagnier letter dated March 6, 1999 stated:

"Likewise, the minimization alternative is not a "practicable" alternative for Mr. Gambel. The purpose of our proposed project is to construct a residence for use by Mr. Gambel and his family. The average residence consists of a home and yard for the use and enjoyment of the individuals residing there. To permit Mr. Gambel to only fill a portion of his property would severely curtail the use and enjoyment of his property and would, for all practical purposes, render his property economically useless. Additionally,

Mr. Gambel has two small children and their safety is of paramount consideration. Therefore, the highest and best use of Mr. Gambel's property would be as a residence and yard capable of providing safety, use, and enjoyment for himself and his family." [Mr. Chris M. Trepagnier letter dated March 6, 1999].

In Mr. Trepagnier's letter dated December 22, 1999, Mr. Trepagnier reiterated that there were no practicable alternatives to the Appellant for the construction of a single-family residence. The Appellant would not accept a draft permit that would avoid impact to the marsh, and restrict construction of his residence to the .5-acre hardwood scrub/shrub wetlands.

By regulation, the Corps is authorized to exercise independent judgment in defining the purpose and need for the project from both the Applicant's and public's perspective [33 CFR 325(B)(9)(b)(4)]. A specific distinction is made between the basic and overall project purpose. The **basic project purpose** is the fundamental, essential or irreducible purpose of the proposed project. Whether a proposed project is water-dependent is derived from that basic project purpose. The Appellant's basic purpose is the establishment of a primary residence.

The Appellant's proposal for the establishment of a primary residence affects a special aquatic site (SAS). The original purpose of the water dependency test was to recognize the special values of special aquatic sites, including wetlands, and to avoid their unnecessary destruction, particularly when less damaging practicable alternatives exist. SAS's are defined as "...geographical areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region." [40 CFR 230.3 (q-1)]. The 404(b)(1) Guideline's presumption, that alternatives not involving SAS are presumed to have less adverse aquatic impact, reinforces the special recognition of and protection of SAS.

MVN properly determined that the Appellant's basic purpose (the establishment of a primary residence) was not water-dependent, and did not have to be located in a SAS to fulfill its basic purpose. The MVN's DD stated that the applicant's proposed residential development would impact 1.5 acres of wetlands, and is not a water-dependant activity.

The 404(b)(1) Guidelines state that water dependency is a rebuttable presumption.

The MVN's DD properly evaluated the rebuttable presumption in the determination of the Appellant's overall project purpose. The **overall project purpose** is determined by the Corps from the applicant's perspective, and is narrowly defined for the purpose of rebutting the presumption.

A permit applicant is not allowed to narrowly define the project's purpose, so as to preclude practicable alternatives. Mr. Gambel's stated overall project purpose is the establishment of an 8,000-cubic foot residence, driveway, boat dock and grassed play area for his children. This overall project purpose would impact 1.5 acres of wetlands. The MVN properly maintained that

the Appellant's overall project purpose is the construction of a primary residence, boathouse, boardwalk and driveway impacting .5 acre of wetlands.

The MVN's decision to limit the overall project purpose was correctly based on the 404(b)(1) Guidelines and Regulatory Guidance Letter 95-01 (RGL 95-01). The 404(b)(1) Guidelines specifically detail the Appellant's right to reasonable, private use and access to navigable waters. The 404(b)(1) Guidelines [33CFR 320.4(g)(1)] state:

"...an inherent aspect of property ownership is a right to reasonable private use. However, this right is subject to the rights and interests of the public in the navigable and other waters of the United States, including the Federal navigation servitude and Federal navigation servitude and Federal regulation for environmental protection."

The 404(b)(1) Guidelines [33 CFR 320.4(g)(3)] also state:

"A riparian landowner's general right of access to navigable waters of the United States is subject to the similar rights of access held by nearby riparian landowners and to the general public's right of navigation on the water surface."

In the Corps' Guidance on Individual Permit Flexibility for Small Landowners [RGL 95-01] the following is provided:

"Specifically, for those activities involving discharges of dredged or fill material affecting up to two acres into jurisdictional (non tidal) for: 1) the construction or expansion of a single family home and attendant features, such as a driveway, garage, storage shed, or septic field..."

RGL-95-01 allows the Corps flexibility in evaluating impacts to **non-tidal wetlands**. The only non-tidal wetlands on the Appellant's property are the .5-acre of hardwood scrub/shrub wetlands. The site's remaining wetlands are characterized as high quality brackish marsh that is subject to tidal inundation. The MVN's proffered permit authorized .5-acre of wetland impacts and is consistent with RGL 95-01.

The 404(b)(1) Guidelines establishes a mitigation sequence. Under 40 CFR230.10 (a), the first step requires the evaluation of potential alternative sites for the location of the proposed project so that the aquatic impacts are avoided to the extent practicable.

In the 404(b)(1) Guidelines, General Policies For Evaluating Permit Applications [33 CFR 320.4(r)(1)(i)] state:

"Project modifications...As a result of these discussions...the District Engineer may require minor project modification. Minor project modifications are those that are considered feasible...will result in a project that generally meets the applicant's purpose and need. Such modifications can include reduction in scope and size."

The MVN properly utilized the allowed flexibility in their application of the 404(b)(1) Guidelines by modifying the Appellant's proposal and determining that alternatives sites not currently owned by the appellant were not practicable. The modified project provided for the applicant's basic project purpose: a primarily residence, driveway, boardwalk and boathouse. These attributes constitute a reasonable private use, and are consistent with the surrounding developments.

Appellant's Reason 2: Moreover, the decision reached by the NOD is arbitrary and capricious. The NOD has classified the habitat, which would be impacted as a result of Mr. Gambel's proposed project, as high quality and the NOD has justified the application of a more stringent analysis based on this classification. This is inconsistent with recent permit decision in the project area.

FINDING: This reason for appeal does not have merit.

ACTION: No Action required.

DISCUSSION: Based on the 404(b)(1) Guidelines, the MVN's DD, and field review, the MVN's determination of the nature of the project site's wetlands was appropriate. The qualification of the project sites wetlands did justify a more stringent analysis. Also, the administrative record demonstrates that the MVN's permit decision was consistent with recent permit decisions in the project area.

MVN's DD documented the coordination with Federal and State organizations. Based on comments received from the Environmental Protection Agency (EPA), the U. S. Fish and Wildlife Service (FWS), and the National Marine Fisheries Service (NMFS), the MVN requested Mr. Gambel modify his project. The MVN referenced the agencies' qualification of the project site wetlands, re-enforcing the MVN's position that the one-acre of marsh wetlands is high quality and would justify a more stringent analysis.

The project site consisted of .5-acre of hardwood scrub/shrub wetlands and one-acre of brackish marsh. The MVN's DD documented the quality of the wetlands, with specific distinction between the .5-acre of hardwood scrub/shrub and the one-acre of brackish marsh. In the MVN's DD, page 6, in the Summary of secondary and cumulative effects, the MVN documents the functions and values associated with brackish marsh in the Lake Maurepas/Ponchartrain/Borgne drainage system. The 404(b)(1) Guidelines, 33CFR320.4(b)(2), discuss eight functions and values associated with wetlands that are part of the public interest. The MVN's DD discloses two wetland functions associated with the one-acre marsh and states: *"Due to the importance of the resources that could be lost as a result of the originally proposed project, a reduced scope of work that provides the applicant with a viable project to meet his needs is being offered."*

The 404(b)(1) Guidelines, 33 CFR320.4 (b)(3) states: *"Although a particular alteration of a wetland may constitute a minor change, the cumulative effect of numerous piecemeal changes can result in a major impairment of wetland resources. Thus, the particular wetland site for which an application is made will be evaluated with the recognition that it may be part of a complete and interrelated wetland area."* The MVN's DD properly considered the cumulative

effect of the Appellant's original proposal, documented that the impacts would be significant, and modified the project.

The 404(b)(1) Guidelines, 33CFR320.4(b)(4), provide that no permit will be granted which involves the alteration of important, identified wetlands and/or would constitute a cumulative effect **unless** the District Engineer concludes that the benefits of the proposed alternative outweigh the damage to the wetland resource. According to the administrative record, the MVN correctly determined that the Appellant's benefits would not outweigh the damage to the one-acre of marsh wetlands and modified the project.

In his RFA, the Appellant asserts the following: *"The entire project area has been previously impacted and is attenuated from the surrounding marsh. Consequently, it is of a lower quality than the surrounding marsh and, thus, the potential for adverse impacts are lessen."* Based on field inspection and review of the administrative record, the MVN's DD appropriately documented the impacts associated with the construction of highway embankments and the reestablishment of the marsh in the one-acre portion of the project site. The MVN also appropriately documented the part of the site (.5-acre hardwood scrub/shrub wetland) that **did not** fully reestablish to a marsh wetland.

According to the administrative record, the MVN did not document how they coordinated the revised project with commenting federal agencies. The administrative record contains documentation of coordination efforts on the original proposed project. Discrepancies in some of the agencies' comments were not documented. The U.S. Fish and Wildlife Service (FWS) letter, dated July 1, 1998, stated that 1.5 acres of high quality brackish marsh would be impacted. The Environmental Protection Agency's (EPA) letter, dated June 22, 1998, stated that 1.5 acres of wetlands to be filled are tidally-connected. The National Marine Fisheries Service's (NMFS) letter, dated June 17, 1998, stated that the applicant should restrict the house and associated structures to upland areas adjacent to the highway. The MVN's DD stated that only one acre of the site was tidally connected, and consisted of high quality brackish marsh. No uplands were identified on the project site. The MVN's DD stated that all comments were considered. In the appeals conference, Ms. Annette Chioma of the MVN stated that she did not remember if she coordinated with the FWS, and was not aware of the discrepancies in the EPA's comment letter. Ms. Chioma stated that she did coordinate with the NMFS but did not document the coordination in the administrative record.

The MVN's lack of coordination with federal agencies concerning the modification of the project, and the commenting agencies' discrepancies is a procedural error. The lack of coordination is harmless, since even had the coordination occurred, this coordination would not have required MVN to revise its initial determination or require a reconsideration. Accordingly, as there is no prejudice to the Appellant from the lack of coordination, the procedural error is harmless.

The extent, location and quality of high quality brackish marsh on the project site justified the application of a more stringent analysis. The MVN's analysis resulted in the modification of the project that limited filling activities to only the lower quality hardwood scrub/shrub wetlands. This is consistent with recent permit decision in the project area.

The Appellant's RFA references historic and recent permit authorizations near the project site. The expansion of Geoghegan Canal to the east was authorized on April 28, 1980. Regulatory laws and regulations have changed significantly in the last twenty years. Notable are the changes in the extent of Corps jurisdiction in the adoption of the 1987 Wetlands Research Program Technical Report Y-87-1 Corps of Engineers Wetlands Delineation Manual (1987 Manual). Prior to the adoption of the 1987 Manual, jurisdictional determinations were based solely on vegetative-based analysis, which could have yielded different results. Public interest factors and economic considerations change over time. The Findings of Fact, dated December 1980, for the expansion of Geoghegan Canal do not clearly indicate that there was an impact to marsh wetland from the deposition of fill material. Field inspection reveals that the excavated slips appear unused. Structures built on the sidecast fill from those slips are no longer jurisdictional wetlands. MVN appropriately evaluated impacts to the aquatic environment associated with the expansion of the Geoghegan Canal using known physical conditions in 1980. Likewise, the MVN's evaluation of the impacts associated with Mr. Gambel's proposed project must be based on present (1999) site conditions.

The Appellant's RFA referenced recently authorized work by Mr. August J. Maurer. Mr. Maurer's project site is located one mile from the Appellant's project site and in a community referred to as Snug Harbor. During the site visit, newly constructed work was observed near Mr. Maurer's site. At the appeals conference, the MVN provided the Section 404 authorization to Mr. Weston Harley Yates, Jr. for the newly constructed work. This work constituted an extension of work previously authorized to Mr. Maurer and later transferred to Mr. Yates. Ms. Chioma stated that the majority of the wetland impacts associated with the newly constructed work by Mr. Yates were confined to hardwood scrub/shrub wetlands, similar to the .5-acre wetlands on the Appellant's site. A minor amount (less than 100 cubic yards) of fill was authorized in the marsh wetlands and was associated with the extension and maintenance of a bulkhead. The review of the administrative record for Mr. Maurer's permit revealed that the deposition of a minor amount of fill material in the marsh was authorized. The marsh wetlands to be impacted had been previously been impacted and totaled .18 acre. Both of these projects constituted minor amounts of deposition of fill material, the authorization of which would not result in impacts outside the public interest and within the 404(b)(1) Guideline's permitting flexibility.

CONCLUSION: For the reasons stated above, I conclude that Appellant's Reasons 1 and 2 for this administrative appeal do not have merit.

Encl

PHILLIP R. ANDERSON
Major General, USA
Commanding